IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. .....

NEW SOUTHERN OHIO GAS COMPANY AND CHARLES EBERSBACH,

PETITIONERS

v.

SYLVIA ROUSH, WILBUR ROUSH, EBER ROUSH, SADIE ROUSH GRINDLEY, GEORGE ROUSH, FLORA ROUSH, FLOSSIE ROUSH AND LILLIAN ROUSH DURST,

RESPONDENTS

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Circuit Court of Appeals

The only opinion rendered by the court below was the per curiam judgment entered by Judge Florence E. Allen October 21, 1943, (R. 81), 138 F. (2d) 411. Appendix A.

Jurisdiction

The jurisdiction of this court is involved under Section 240 of the Judicial Code (28 USCA #347). The judgment of the Circuit Court of Appeals was entered October 21, 1943. The petition was filed January ....., 1944.

The Facts

The facts are stated in the petition, page 4. We emphasize that the facts herein are entirely undisputed.

The second paragraph of the statement, referring to the request of the Roush heirs that petitioner drill a well on the lease, the reliance of Proffitt and petitioner on such request, and the subsequent controversy concerning the ownership of the lease and the oil well drilled thereon by petitioner and Proffitt, are merely explanatory of the circumstances preceding the reopening of the bankruptcy proceedings and are not primary facts involved in the question before the referee. The merits of any controversy between petitioner and the Roush heirs were not involved in such questions. As the referee stated, "there is no need to consider the rights of the Roush heirs as compared with the rights of the corporate applicant". (R. 43).

Incidentally, the same second paragraph shows that the referee's conclusion results in gross, unnecessary miscarriage of justice.

SPECIFICATION OF ERROR

The Circuit Court of Appeals for the Sixth Circuit has adopted the general rule that a finding of fact by a referee, confirmed by the district court, should not be disturbed for anything less than a demonstration of plain mistake. The rule so stated is incomplete and ignores a well established exception within the scope of which the instant case falls. Fully stated, the correct rule is that a finding of a referee, confirmed by a district court, should not be disturbed for anything less than a demonstration of plain mistake, unless the finding is *based upon documentary or other evidence which*

is not conflicting, involving no question as to weight or credibility.

As stated in the petition, one of the grounds for the issuance of the writ herein is the conflict between the limited or incomplete rule of the Sixth Circuit and the correct rule of other circuits, and we respectfully maintain that the application by the Circuit Court of Appeals of an incorrect rule in conflict with the correct rule was prejudicial error resulting in a miscarriage of justice.

Moreover, the Circuit Court of Appeals, in conflict with the decisions of other circuits, erroneously regarded the order of the Referee, construing an order of a former referee, as a *finding of fact* instead of as a *conclusion of law,* with the result that petitioners were denied the full review on the merits that would have been accorded them in other circuits.

ARGUMENT

I.

The referee in bankruptcy was required to determine the legal effect of a certain order made by a former referee (R. 8) and in so doing reached not a "finding of fact" but a conclusion of law.

The Corporate petitioner maintains that, under the undisputed facts, it is entitled to receive the assets of the bankrupt pursuant to the order of June 26, 1936, (R. 8) confirming the trustee's report of distribution of the assets likewise filed June 26, 1936. (R. 7). The case being reopened May 10, 1941, (R. 2) for the express purpose of obtaining a formal written transfer of said assets, it was the duty of the new referee to

read the record and determine the legal effect of said order made by the former referee about four years prior thereto. The only question before the referee was as to the meaning and legal effect of the former order. There was no dispute as to the facts, the existence of the order and the exact terms thereof being unquestioned. The new referee was merely required to construe said order and determine whether, as between the trustee for the bankrupt and the corporation of creditors, the latter was entitled to the assets.

The referee held that the corporation of creditors (petitioner) was not entitled to that portion of the assets known as the Roush Lease. The order of the referee was confirmed by the District Court. The Circuit Court of Appeals, applying the harsh rule of the Sixth Circuit as to orders of a referee confirmed by a judge, treated the referee's conclusion as a "referee's finding of fact that the Roush lease had not been conveyed to the appellant company." Under the rule of other Circuits such a decision, even though confirmed by the district judge, is treated not as a finding of fact, but as a conclusion of law, not depriving the Appellant of a full review on the merits.

Bendix Home Appliances v. *Radio Accessories Corp.* 8 Cir., 129 F. (2d) 177, The Court says, at page 182.

> "It is true that the court denominated its holding a finding of fact, but the matter involved was the construction of the contract, a question of law. Its inclusion within the court's finding of fact is not determinative of its real nature nor is it binding upon this court."

Midwood Associates, Inc. v. *Comm. of Internal Revenue*; 2 Cir., 115 F. (2d) 871, Syllabus;

> "Where resolution by directors of a corporate lessor ----- was construed by the Board of Tax

> Appeals as being neither an assignment nor a declaration of trust, for tax purposes, the determination of the Board was not a 'finding of fact' but was an interpretation of a written document which the court was free on review to construe for itself."

Lambert Lumber Co. v. *Jones Engineering & Construction Co.* 5 Cir., 47 F. (2d) 74, at page 77, The Court says:

> "That a conclusion of law may be placed in the category of findings of fact does not change the character of the conclusion, and make it something that it is not."

Union Trust Company v. *Commissioner.* 3 Cir., 84 F. (2d) 386, at 387 the Court said:

> "The decisive question is whether the deed of trust created one or five trust estates. Since this question involves the construction of a written contract it is a question of law and the board's conclusions are subject to review on appeal."

Himmel Bros. Co. v. *Serrick Corporation,* 7 Cir., 122 F. (2d) 740, at page 742, the Court said:

> At the outset it is argued by the plaintiff that we are bound by the facts as found by the District Court. ***** We are of the opinion that the rule "carries little, if any, weight in the instant matter for the reasons (1) the findings relied upon appear to be conclusions of law rather than findings of fact, and (2) substantially all the testimony in the case was taken by deposition and under those circumstances, the court below was in no better position to judge of the credibility and the weight to be given to the witnesses than this court."

The syllabus reads as follows:

> "Where district court's findings appeared to be conclusions of law rather than findings of fact, and substantially all the testimony

> was taken by deposition so that the district court was in no better position to determine credibility and weight to be given to witnesses than Circuit Court of Appeals, federal rule, prohibiting setting aside of findings of fact unless clearly erroneous, carried little weight."

Russell v. *Ely,* 67 U. S., 575, 17 L. Ed. 258.

This case is cited only as to the general proposition that the construction of a written instrument, in this case the order of June 26, 1936, is a conclusion of law. The syllabus, which is in the language of the Court, reads as follows:

> "It is the province of the court, in trials by jury, to construe instruments of writing and determine their legal effect."

In view of the statement of the Circuit Court of Appeals that "the record presents no evidence of any order of the bankruptcy court conveying to the appellant company any right, title or interest in the Roush lease," it may be contended that the Court did fully review the decision of the referee notwithstanding its statement of the rule here questioned. We respectfully submit that such a claim would be without merit.

In the first place, petitioners did not contend that there was an order *conveying* the Roush lease to it. On the contrary, the bankruptcy case was reopened for the express purpose of obtaining an order directing the trustee to assign the Roush lease to petitioner, New Southern Ohio Gas Company, for the reason that the former referee, by the order of June 26, 1936, intended to sell or "distribute" the assets of the bankrupt not theretofore sold, including the Roush lease, to New Southern Ohio Gas Company, the corporation organized

pursuant to a former order of the court "to acquire the assets of the bankrupt".

In the second place, the referee did not find that the Roush lease had not been *conveyed* to said petitioners. The referee held "that as between the estate of Southern Ohio Gas Company, bankrupt, and the corporation New Southern Ohio Gas Company, New Southern Ohio Gas Company *is not entitled* to a conveyance of whatever right the bankrupt may have had in the Roush lease." (R. 33). This conclusion of the referee was not a *finding of fact,* but a *conclusion of law* as to the effect of the order of June 26, 1936. A review of the referee's decision, therefore, required the construction of that order and a mere search of the record by the Circuit Court of Appeals to find an order conveying title which was not claimed to exist was not the equivalent of the construction of the order of June 26, 1936, and was not a review of the referee's decision determining the meaning and legal effect of that order, as required by petitioners application in the bankruptcy court and by its appeal to the Circuit Court of Appeals from the decision of the referee and the District Court.

II.

The conclusion of the referee, even if it could be regarded as a finding of fact, was subject to full review by the Circuit Court of Appeals because it resulted in a miscarriage of justice and was based upon undisputed documentary evidence not involving any question of credibility or weight.

We are not complaining because the "demonstration of plain mistake" test applied in the Sixth Circuit in cases of concurrent findings of the referee and court

is somewhat more drastic than the test in other Circuits. And we should not object to the Court's statement of its general rule without mentioning the important exception of the case before it were not one falling *within the exception.* But we submit that under the decisions of other circuits (where the exception is recognized) the harsh rule of the Sixth Circuit would not be applied in the instant case because the conclusion or "finding" of the referee resulted in unnecessary miscarriage of justice, was based upon the construction of the former trustee's order of June 26, 1936, and there was no question of credibility of witnesses nor weight of evidence and the Circuit Court of Appeals was in as good a position as the referee to reach a correct conclusion.

In Re John Koke Co. 9 Cir., 38 F. (2d) 232. Rudkin, C. J., at page 233 says:

> "Inasmuch as there was no conflict in the testimony, the rule invoked by the appellee, that an appellate court will ordinarily accept the findings of the referee approved by the trial judge, is without application."
>
> Decree reversed.

In Re Sullivan Condensed Milk Co. 7 Cir., 291 F. 66, Evan A. Evans, C. J.:

> "The referee found that this note had been paid, and his finding was confirmed by the court." Page 67. And further, "this is not a case where the Court saw and heard the witnesses whose testimony is conflicting. It is a case where the facts are stipulated and we are to make deductions from the stipulated facts. The finding of the referee is therefore entitled to no more weight

than the stipulated facts warrant. We conclude that the $4000.00 thus loaned was never repaid, and she should therefore have been allowed a claim for this amount and interest."

Reversed.

In Re Levy, 2 Cir., 92 F. (2d) 436. Mack, C. J., after stating the facts, says:

"There is no contradiction in the testimony as to these matters." And "while reluctant to reverse the findings of the referee, concurred in by the District Court, on questions of fact and good faith, we can find no evidence in the record of fraudulent intent in the omission to schedule such a claim, clearly known to at least this objecting and scheduled creditor."

Order of referee, confirmed by District Court, reversed.

U. S. v. *Georgia Railway*, 5 Cir., 107 F. (2d) 3, holds, (Syllabus)

"Where documentary and other evidence was without contradiction, Circuit Court of Appeals is not required to take facts as found by the district judge, but *must* determine legal effect of facts as presented by record, on appeal from judgment." (ITALICS OURS)

Reversed and remanded.

Norment v. *Stilwell*, 2 Cir., 135 F. (2d) 132. Syllabus.

"Where all evidence was by deposition or affidavit, the Circuit Court of Appeals was in as good a position as the District Court to appraise the evidence to determine whether the bankrupt's application for discharge had been abandoned, *and was required to do so.*" (ITALICS OURS)

Equitable Life v. *Irelan,* 9 Cir., 123 F. (2d) 462. Syllabus.

> "The federal rule relating to findings by the court was intended to accord with decisions on the scope of review in federal equity practice, wherein if testimony is by deposition, reviewing court gives slight weight to findings."

At page 464 the Court says, since all the testimony was by deposition,

> "this court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that."

American Asiatic Co. v. *Robert Dollar Co.,* 9 Cir., 1922, 282 F. 743. The Circuit Court of Appeals said, at page 746,

> "As the testimony of the witnesses in these cases was not taken in the presence of the District Judge, we, (the CCA) are to examine it and reach our own conclusions." (Cert. denied 43 Sup. Ct. 361)

Sun Insurance Office v. *Be-Matic Transport Co.,* 8 Cir., 1942, 132 F. (2d) 535. The Court said at page 536:

> "Although the trial court made findings of fact appearing in the record, it was not called upon to pass on the credibility of any witness. There was no conflict in evidence and the appeal *imposes* on this court the duty of ruling upon the questions of law presented." (ITALICS OURS)

Commissioner v. *Boeing,* 9 Cir., 106 F. (2d) 305.

> "The only evidence taken before the Board was in the form of documentary exhibits and oral testimony by the respondent and his financial secretary. The petitioner offered no evidence at the hearing before the board. There is, therefore, no conflict in the testimony." p. 307.

> "Conclusions of the Board of Tax Appeals that gains and losses from sales of timber resulted from the sale of capital assets within the statutory definition and that timber sold was not stock in trade of the taxpayer * * * were 'conclusion of law' or 'mixed questions of law and fact' subject to independent judicial review by the Circuit Court of Appeals." 2nd Syllabus.

Wigginton v. *Order of United Comm. Travelers of America;* 7 Cir., 126 F. (2d) 659;

The Court says at page 661:

> "Since the facts are not in dispute, we are free to consider them and to reach our own conclusion, untrammeled by the District Court's findings and conclusions of law."

Carr v. *Southern Pacific Co.,* 9 Cir., 1942, 128 F. (2d) 764;

The trustee in bankruptcy of the estate of Southern Pacific Golden Gate Ferries, Ltd., filed a petition for an order directing the Southern Pacific Company to turn over to the trustee certain bonds issued by the bankrupt. On appeal from an order of the District Court reversing an order of the referee, directing that the bonds be delivered to the trustee as property of the bankrupt, the Circuit Court of Appeals said, on page 768;

> "Appellant claims the findings of the referee were made on a controverted question of fact and, hence, cannot be disturbed. This is not the fact or the law. The statement in our decision in re Eastern Oil Co., 9 Cir., 100 F. (2d), 341, 342, that, "It is conceded by all the parties ******* that 'the findings of the Referee upon controverted facts will not be disturbed' " is relied upon in support of this claim. ***** However, the rule relied upon has no application for in the case at bar no question of credibility of witnesses appearing before the referee is involved. On the contrary,

> *the parties agree as to exactly what occurred and what was said, differing only as to the effect of the language used. The district judge and the judges of this court are in as good a position to interpret such language as was the referee."* (ITALICS OURS)

In the case at bar the existence of the order of June 26, 1936, and the words therein used were undisputed and the order was submitted to the referee for his construction. This Court has concisely said, "The effect of admitted facts is a question of law." *Nelson* v. *Montgomery Ward & Co.*, 61 S. Ct. 593, *595;* 312 U. S. 373; 85 L. Ed. 897.

The referee's decision results in an unnecessary miscarriage of justice and calls for a consideration of the rule as announced in other circuits.

In Re: *Bradley,* 2 Cir., 269 F. 784,

At page 786, the Court says:

> "Where both the District Court and the referee agree, their conclusions will be accepted by the Circuit Court of Appeals, *unless justice requires a different conclusion."* (ITALICS OURS)

Salsburg v. *Blackford,* 4 Cir., 204, F. 438;

At page 440, the Court says:

> "The referee and the learned judge were both of the opinion that the Receiver was properly in possession of the goods and so found. When they agree, their conclusions are accepted by this Court, *unless it is clear that justice requires us to reach a different conclusion."* (ITALICS OURS)

III.

The intent and legal effect of the order of the District Court entered June 26, 1936, (R. 8) was to sell or "distribute" to petitioner the remaining assets of the bankrupt, including the bankrupt's interest in a certain oil and gas lease known as the Roush lease.

IV.

The respondents, the Roush heirs, are not proper parties in interest and have no right to object to the relief prayed for by the petitioners, to which no creditor has objected.

Inasmuch as propositions III and IV are the questions that were presented to the Circuit Court of Appeals and not considered on the merits by that court, they are the questions that will be submitted to this Court if the Writ of Certiorari is granted. Therefore these questions are not argued at this time, but the following brief summary is offered to show the miscarriage of justice which is one of the points on which the rule of the Sixth Circuit is in conflict with the rule in other circuits.

New Southern Ohio Gas Company claimed that it is entitled, under the order of June, 1936, to all the assets of the bankrupt, Southern Ohio Gas Company. The particular asset in dispute is one oil and gas lease out of a large number formerly owned by the bankrupt. The interest of the bankrupt, Southern Ohio Gas Company, was that of lessee, 7/8 working interest. The interest of the Roush heirs was that of lessor, 1/8 royalty interest. The record is undisputed that in 1940 the Roush heirs asked that a well be drilled on the said

lease and that thereafter New Southern Ohio Gas Company and others, relying upon the company's interest and the representations of the Roush heirs, did drill a well costing thousands of dollars.

The Roush heirs now contend that the lessee interest did not pass from Southern Ohio Gas Company to New Southern Ohio Gas Company. It is certain that if it did not so pass, it did not pass to the Roush heirs but still remains an asset of the bankrupt estate. This, however, would be flatly inconsistent with the order of June, 1936, and the fact that thereafter the estate was closed.

We submit that the intention of the referee to transfer only a portion of the assets in 1932 is apparent not only from the wording of the order itself but from the fact that transfer had been contemplated and confirmed by the court over the signature of Judge Hough, the remaining assets continued to be administered by the trustee until 1936. We submit that likewise the intention of the referee to dispose of all of the remaining assets in 1936 is apparent not only from the wording of the order itself, which is not limited to any particular assets but transfers "the assets of the bankrupt," but it is also apparent from the fact that after this transfer, confirmed by the court over the signature of the referee, the estate was closed. To us, it seems absurd to contend that the second transfer and confirmation was applicable to the property already transferred and confirmed four years previously. It would have been meaningless for the referee in 1936 to again confirm the transfer that Judge Hough himself had confirmed in 1932, and yet that is the decision of the second referee.

It is apparent that the referee and trustees intended and attempted to actually sell the operating leases and

when no satisfactory offer could be had the procedure of private sale, as already begun, was followed and the property "sold" to the creditors incorporated in New Southern Ohio Gas Company. With respect to the unsold property remaining in the hands of the trustee, there was no attempt at a sale to outsiders, but a *distribution* to creditors was made June 26, 1936, by ordering "the assets of the bankrupt" transferred "to New Southern Ohio Gas Company, the corporation formed to acquire the assets of the bankrupt."

What the Roush heirs own is the lessor royalty interest which amounts to one-eighth of the production regardless of who owns the lessee seven-eighth working interest. It seems to us that the referee should not have overlooked the undisputed fact that on May 19, 1940, these same Roush heirs recognized New Southern Ohio Gas Company's title and request that a well be drilled, as well as the further fact that they represented to a well driller, Roy Proffitt, the company's title and induced him to purchase one-fourth of the working interest and contract for the drilling of the well.

If the referee's order were permitted to stand it would do the respondents, Roush heirs, no good and would result in a miscarriage of justice as to the creditors and Roy Proffitt, who has not only bought part of the working interest but has drilled the well. The Roush heirs were offered a portion of the working interest and Proffitt has offered to transfer, out of the interest he has purchased, the proper proportionate part to any creditor that may desire to participate in the development. But there are no such creditors. No creditor has objected to the sale or "distribution" of the assets of the bankrupt to the new company. It seems incredible that the Roush heirs should desire, or

should be permitted, to attempt to take the working interest away from those that have spent the money to develop the property.

Respectfully submitted,

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